UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LUAN TRAN, D. MARK DURCAN, TYLER A. LOWREY, ROB B. KERR, and KRIS K. BROWN

Appeal No. 2005-2155
Application No. 10/059,727

ON BRIEF

Before HAIRSTON, GROSS, and NAPPI, ***Administrative Patent Judges***.

GROSS, ***Administrative Patent Judge***.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 8 and 10 through 25.

Appellants' invention relates to a semiconductor memory array. Claim 11 is illustrative of the claimed invention, and it reads as follows:

11. A memory device comprising:

memory cells each having an area of about $6F^2$;

sense amplifiers;

bit lines coupled to the sense amplifiers in a folded bit line arrangement;

active area lines; and

transistors formed in the active area lines and electrically coupling corresponding memory cells to corresponding bit lines.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Chu et al. (Chu)	5,107,459	Apr. 21, 1992
Aoki et al. (Aoki)	5,747,844	May 05, 1998

Claims 1 through 8 and 10 through 25 stand rejected under 35 U.S.C. § 103 as being unpatentable over Aoki in view of Chu.

Reference is made to the Examiner's Answer (Paper No. 12, mailed March 9, 2004) for the examiner's complete reasoning in support of the rejection, and to appellants' Brief (Paper No. 10, filed November 20, 2003) and Reply Brief (filed May 10, 2004) for appellants' arguments thereagainst.

OPINION

We have carefully considered the claims, the applied prior art references, and the respective positions articulated by appellants and the examiner. As a consequence of our review, we will reverse the obviousness rejection of claims 1 through 8 and 10 through 25.

Appellants argue (Brief, page 13) that Aoki teaches that folded bit line arrangements are space inefficient and chooses an

open bit line configuration instead. Appellants continue (Brief, page 14) that Aoki did not recognize that a $6F^2$ memory cell could be achieved with a folded bit line arrangement, nor did Chu suggest such. Therefore, appellants conclude (Brief, page 14) that a prima facie case of obviousness has not been established. We agree.

The examiner (Answer, pages 3-4) relies primarily on Aoki, adding Chu for bit lines including first and second level portions that are vertically separated from one another. The examiner admits (Answer, page 4) that Aoki fails to disclose a dimension of $6F^2$ for a folded bit line configuration. The examiner asserts (Answer, page 4) that such dimensions were known, as disclosed by Keeth, which is not included in the statement of the rejection. The examiner concludes (Answer, page 4) that it would have been obvious to "scale a folded bit line to a smaller size for the purpose, for example, of enhancing the integration density of the MOS device."

The Court in ***In re Hoch***, 428 F.2d 1341, n. 3, 166 USPQ 406, n. 3 (CCPA 1970), held that "[w]here a reference is relied on to support a rejection, whether or not in a 'minor capacity,' there would appear to be no excuse for not positively including the reference in the statement of rejection." The Court affirmed the

rejection in that case because the references relied upon but not included in the statement of the rejection were not needed to meet the limitations of the claims. Here, however, the examiner relies upon Keeth (Answer, pages 4, 6, and 7) and Mori (Answer, page 7) to show the inventive concept (i.e., in a major capacity), without including them in the statement of the rejection. Thus, in accordance with ***Hoch***, we will not consider Keeth or Mori, as they are not properly before us.

In the Response to Arguments section of the Answer, the examiner states (Answer, page 6), "The size dimension in this application cannot be considered the sole determining factor for patentability." The examiner relies on ***In re Rose***, 220 F.2d 459, 105 USPQ 237 (CCPA 1955), and ***Gardner v. TEC Systems, Inc.***, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), as support for the proposition that a difference in size is not patentable. The examiner explains (Answer, page 7) that the Court in ***Gardner*** held that merely a difference in size with no difference in performance is not patentably distinct from the prior. The examiner asserts in the next paragraph that "[t]here is no argument that the claimed $6F^2$ device will function in a different manner than the $8F^2$ device of Aoki." We disagree with the

examiner's assumptions. Appellants argue (Reply Brief, pages 5-6) that the $6F^2$ device will function differently than the $8F^2$ device. Therefore, the difference in dimension can render the claims patentably distinct over the prior art.

Without Keeth and Mori, we find nothing in either Aoki or Chu, nor any convincing explanation in the Examiner's Answer, that would suggest a folded bit line configuration with a $6F^2$ dimension. Therefore, we cannot sustain the rejection of independent claims 1, 11, 18, and 19, all of which recite memory cells having an area of about $6F^2$ in a folded bit line arrangement, nor of their dependents, claims 2 through 8, 10, 12 through 17, and 20 through 25.

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CONCLUSION

The decision of the examiner rejecting claims 1 through 8 and 10 through 25 under 35 U.S.C. § 103 is reversed.

REVERSED

KENNETH W. HAIRSTON Administrative Patent Judge	)
ANITA PELLMAN GROSS Administrative Patent Judge	) BOARD OF PATENT APPEALS AND INTERFERENCES
ROBERT NAPPI Administrative Patent Judge	)

AGP/rwk

Appeal No. 2005-2155
Application No. 10/059,727

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AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION
CRIMINAL JUSTICE SECTION
TORT AND INSURANCE PRACTICE SECTION
SENIOR LAWYERS DIVISION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED THAT the American Bar Association opposes the practice of various federal courts of appeal in prohibiting citation to or reliance upon their unpublished opinions as contrary to the best interests of the public and the legal profession.

FURTHER RESOLVED THAT the American Bar Association urges the federal courts of appeals uniformly to:

1) Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and

2) Permit citation to relevant unpublished opinions.

DRAFT – March 30, 2001

REPORT ON RECOMMENDATION FOR PUBLICATION AND RELIANCE UPON UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS

As the number of cases heard and decided by federal appellate courts increased, without a concomitant increase in staffing, funding, or judicial resources, the courts adopted rules concerning the publication and non-publication of their decisions, and set parameters concerning the use and effect of and citation to unpublished decisions. Generally speaking, the approach favored by the federal courts of appeals has been to give the courts discretion in deciding which cases to publish in official case reporters, and which cases not to publish. The appellate courts also have discretion to determine whether, to what extent, and for what purposes their unpublished decisions may be cited. A slim majority of federal appellate courts has adopted a companion principle, which is that decisions not designated for publication not only do not constitute binding precedent, but cannot even be cited for their possible persuasive value.

This Report provides an overview and summary of federal courts of appeals rules concerning litigants' ability (or inability) to cite unpublished opinions and the effect, if any, to be given by the courts to such unpublished decisions. The Report examines the historic rationale for such rules and addresses the continued vitality of these rationale. The Report concludes that the justifications for rules prohibiting citation to unpublished federal appellate decisions no longer carry substantial weight, and that the ABA should support a recommendation that all federal appellate courts (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet websites; and (2) permit citation to relevant unpublished opinions.[1]

1. Overview of Federal Appellate Court Rules Concerning Citations to Unpublished Decisions or Orders

All of the federal courts of appeals have rules governing citation to unpublished decisions or orders. These rules fall into two general categories.

The first category consists of rules that prohibit the citation to unpublished decisions except for purposes of establishing the doctrines of the law of the case, *res judicata* or collateral estoppel. The Federal, District of Columbia, First, Second, Seventh, Eighth and Ninth Circuits, as well as the Federal Court of Claims, have such rules.[2]

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[1] The Report and Recommendation do not address the threshold issue of publication of appellate decisions or the criteria employed by courts in making decisions concerning publication.

[2] *See* Fed. Cir. R. 47.6(b); D.C. Cir. R. 28(c); 1st Cir. R. 36(2)(F); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 8th Cir. R. 28A(i); 9th Cir. R. 36-3; Fed. Ct. Cl. R. 52.1. *But see* discussion *infra* at 3.A. concerning the Eighth Circuit's recent decision concerning the constitutionality of its rule.

The Court of Appeals for the District of Columbia goes further in prohibiting citation not only to the court's own unpublished decisions, but to unpublished decisions from other courts as well, unless the particular court considers its unpublished decisions to be precedential.[3]

The second category consists of rules that disfavor the citation to unpublished decisions, but allow citation if counsel believes that the decision has precedential value in relation to a material issue in a case and if there is no published opinion that would serve as well. The rules require that counsel must provide a copy of the unpublished opinion to the court. The Fourth, Fifth, Sixth, Tenth and Eleventh Circuits take this approach.[4]

Finally, the Third Circuit simply states that it will itself not cite to any of its unpublished opinions because they are not precedent.[5] However, the Third Circuit does not place any restrictions on the ability of parties to cite to unpublished decisions.[6]

In addition to the federal court rules, the American Bar Association's Standing Committee on Ethics states that it is:

> ethically improper for a lawyer to cite to a court an unpublished opinion . . . where the forum court has a specific rule prohibiting any reference in briefs to an opinion . . . marked . . . 'not for publication.'[7]

2. Origins of and Rationale for Rules Restricting Effect of and Citation to Unpublished Decisions or Orders

[3] *See* D.C. Cir. R. 28(c).

[4] *See* 4th Cir. R. 36(c); 5th Cir. R. 47.5; 6th Cir. R. 24(c); 10th Cir. R. 36.3; 11th Cir. R. 36-2; *see also* Report of the Committee on Federal Courts on the Second Circuit's Rule Regarding Citation of Summary Orders (July 17, 1998), discussed *infra* at 3.C, in which the Committee on Federal Courts recommends that the Second Circuit adopt a rule governing citation to unpublished summary orders similar to the rules in the Fourth, Sixth and Tenth Circuits.

[5] 3d Cir. IOP 5.8.

[6] *See* 3d Cir. R. 28.3 ("Citations to federal decisions that have not been formally reported shall identify the court, docket number and date, and refer to the electronically transmitted decision.").

[7] ABA Formal Op. 94-386R.

The origin of rules restricting citation to unpublished decisions is linked to the determination that certain opinions should not be published.[8] Up to and through the 1960's and 1970's, the vast majority of decisions from federal courts, even one-word Memorandum Decisions, routinely were published.[9] However, that same period experienced a significant increase in the number of opinions being handed down by the federal courts.[10] In 1964 the Judicial Conference of the United States expressed concern over the number of published opinions that might impose unreasonable costs and practical difficulties in maintaining access to the published reports.[11] Thus, the Judicial Conference recommended that the federal courts of appeals publish "only those opinions which are of general precedential value."[12] In 1971 the Federal Judicial Center issued a report which further highlighted the problems faced by the federal courts due to the increasing caseload.[13] In 1972, the Judicial Conference directed the federal circuits to develop plans to limit the publication of opinions, which eventually resulted in the current rules in the federal courts.[14]

The concern over the number of opinions generally is expressed in two ways. First, as the amount of decisions increases, so too does the cost of publishing, disseminating and researching them.[15] There was a fear that the increased costs will be passed on to the consumer of legal services, resulting in inequities as only those who can afford to pay these high costs will obtain the best legal advice.[16]

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[8] For an in-depth discussion of the history and rationale for unpublished opinions, see Donna Stienstra, Federal Judicial Center, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (1985); William L. Reynolds and William M. Richman, The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978) ("Reynolds and Richman I"); William L. Reynolds and William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U.Chi. L. Rev. 573 (1981) ("Reynolds and Richman II").

[9] Kirt Shuldberg, Digital Influence: Technology and Unpublished Opinions in the federal courts of appeals, 85 Calif. L. Rev. 541, 546 (1997); Donald R. Songer, Criteria for Publication in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 308 (1990) ("It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small.").

[10] Hon. Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 Ohio St. L.J. 177, 181-85 (1999).

[11] Report of the Proceedings of the Judicial Conference of the United States 11 (1964).

[12] *Id.*

[13] William L. Reynolds and William M. Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L.J. 806, 808 (1979).

[14] Report of the Proceedings of the Judicial Conference of the United States 33 (1972).

[15] Shuldberg, supra note 9, at 547-48.

[16] Reynolds and Richman I, supra note 8, at 1188-89.

As the number of federal cases grew, federal judges and their clerks indicated that they were unable to keep up with and resolve their caseloads in a timely manner. Thus, a second concern was that the efficiency of the federal court system would be compromised by the need to publish every single decision, no matter how unimportant.[17] By selectively publishing opinions, judges could spend less time writing opinions and more time resolving a larger number of cases.[18] Moreover, in the interests of judicial efficiency, courts should spend more time on published opinions that substantially advance the state of the law, and not publish opinions that only resolve a dispute between litigants.[19]

Having made the determination not to publish certain decisions, it quickly was decided that citation to these decisions should be restricted. It was argued that unfettered citation to unpublished decisions would substantially undermine the purposes of selective publication – reduction of costs and increased judicial efficiency.[20] If litigants could cite to unpublished decisions, the parties and the court still would have to spend time researching these cases.[21] Alternate collections of these decisions would develop and practitioners and law libraries would have to invest funds to keep abreast of these collections. Judicial efficiency also would suffer, the argument went, because judges would feel compelled to spend more time writing opinions that they know were going to be cited anyway.[22]

In addition, there was a concern that allowing citation to unpublished decisions was unfair because certain litigants would have more access to the body of unpublished opinions than others.[23] For example, attorneys with greater time and resources would more easily be able to bear the costs of researching and maintaining collections of the decisions, and frequent litigants, such as the government, would have access to a greater number of unpublished opinions

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17 Shuldberg, supra note 9, at 548; Martin, supra note 10, at 190; Joiner, Limiting Publication of Judicial Opinions, 56 Judicature 195, 196 (1972).

18 Martin, supra note 10, at 190; George M. Weaver, The Precedential Value of Unpublished Judicial Opinions, 39 Mercer L. Rev. 477, 479 (1986).

19 Richard A. Posner, The Federal Courts: Crisis and Reform, 124 (1985); Comm. on the Use of Appellate Court Energies, Advisory Council for Appellate Justice, FJC Research Series No. 73-2, Standards for Publication of Judicial Opinions 5 (1973).

20 Reynolds and Richman I, supra note 8, at 1186-87.

21 Shuldberg, supra note 9, at 550; Martin, supra note 10, at 190.

22 Shuldberg, supra note 9, at 550.

23 *Id.*

issued in the numerous cases in which they are involved.[24] The argument was that citation to unpublished decisions should be restricted so that these attorneys and litigants did not have an unfair advantage over smaller or less well-funded parties.

3. Bases for Recommending Changes to Rules Restricting Effect of and Citation to Unpublished Decisions

Many of the stated justifications for rules limiting or prohibiting citation of unpublished decisions deserve renewed scrutiny today, especially in view of technological developments that have made the availability and accessability of unpublished decisions more widespread and easier than in the past.[25] In addition, a recent decision of the Eight Circuit Court of Appeals addressing the issue of the Constitutionality of rules barring citation to unpublished decisions bears mention, although the focus of this Report and the bases for the proposed Recommendation involve practical concerns and general issues of the operation of appellate courts and their decision-making rather than the Constitutional grounds raised by the Eighth Circuit.

Constitutional Analysis of *Anastasoff v. U.S.*

A panel of the Eighth Circuit Court of Appeals recently added a new wrinkle to the debate over unpublished opinions in the case *Anastasoff v. United States*.[26] On August 22, 2000, Judge Richard S. Arnold, writing for the court, held that the Eighth Circuit's rule restricting citation to unpublished opinions violated Article III of the Constitution. In affirming the district court's denial of Ms. Anastasoff's claim for a tax refund, the panel relied on an unpublished Eighth Circuit case, *Christie v. United States*. *Christie* was directly on point and squarely addressed the issue before the court.

Ms. Anastasoff argued that the panel was not bound by the decision in *Christie* because, per the Eighth Circuit's own rule, it was unpublished.[27] Rather than follow the rule, Judge Arnold noted that the Framers of the Constitution considered the federal courts to have

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[24] Standards for Publication, supra note 19, at 18; Stienstra, supra note 8, at 3 (noting that the U.S. Attorney is a frequent litigant who might benefit if citation to unpublished opinions is allowed); Reynolds and Richman I, supra note 8, at 1179; Lauren K. Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals, 87 Mich. L. Rev. 940, 958-59 (1989).

[25] *See, e.g.*, Charles E. Carpenter, Jr., The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy? 50 S.C. L. Rev. 235 (1998); Shuldberg, supra note 12.

[26] 223 F.3d 989 (8th Cir. 2000).

[27] *See* 8th Cir. R. 28A(i).

certain powers, which the Framers delegated to the courts and limited by virtue of Article III. Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. Therefore, the Framers considered that every judicial decision is authoritative to the extent necessary for the decision and must be applied in subsequent cases to similarly situated parties. Because all judicial decisions result in the creation of precedent, and Article III implicitly formalizes the doctrine of precedent, the federal courts do not have the power to decide which of their opinions create precedent. Thus, the rules purporting to restrict the creation of precedent are unconstitutional.

Judge Arnold was careful to point out that the panel's decision in *Anastasoff* does not impact the federal courts' ability to designate certain opinions as not for publication. Judge Arnold's point was that, regardless of the fact that nonpublication of decisions may have practical value in terms of saving space and time, the federal courts do not have the discretion to limit the doctrine of precedent implicit in Article III.

Ms. Anastasoff filed a petition for rehearing *en banc* before the Eighth Circuit.[28] Before the *en banc* panel could issue a decision, the United States mooted the case by paying Anastasoff the entire amount of her claimed refund. Consequently, on December 18, 2000, the *en banc* panel vacated Judge Arnold's opinion and remanded to the District Court with directions to vacate its judgment as moot.[29]

Practical Litigation Concerns

Several practical litigation considerations can be advanced to support a departure from rules limiting or forbidding citation to unpublished decisions.

First, and perhaps foremost, is the issue of the quality and extent of the record upon which to base a further appeal. Rules barring citation to unpublished decisions prevent a party from creating a complete record of the authorities and prior appellate rulings bearing on a matter.[30]

Second, by restricting the effect and use of such decisions, rules against citation of unpublished decisions also impact the appellate court's ability to provide a complete and instructive record of the court's analysis and rationale for its decision, likewise impacting future proceedings. This impact can be felt both in terms of a court's inability to support its decision by

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[28] *See* Steve France, Analysis & Perspective, 69 U.S. Law Week 2227 (BNA, Oct. 24, 2000).

[29] United States v. Anastasoff, 235 F.3d 1054 (8th Cir. 2000).

[30] Carpenter, supra note 25, at 247-48.

reference to prior (but unpublished) decisions, and in its inability to cite or rely upon such decisions in distinguishing the outcome of another case.[31]

Third, rules against citing unpublished decisions may create anomalous situations in which the prior (but unpublished) decisions of a particular court of appeals are given less weight (or perhaps no weight at all) than (published) decisions of other appellate courts. Both litigants and appellate courts likely would agree that the expectations of the parties and the federal appellate system would be better served where a court's own body of prior decision-making is given proper credence and effect vis-a-vis the decisions of a sister court.[32]

Fourth, the lack of uniformity among the rules and approaches of the various federal appeals courts also is problematic. The same unpublished opinion may be citable for its persuasive value in one circuit court, but not citable in another. This difference in approach is particularly vexing because it could result in situations where an unpublished opinion could be cited to sister courts, but not to the court authoring the opinion.

Fairness/Access Issues

The fairness and access concerns that historically have been raised to justify rules against citation to unpublished decisions appear to be obviated, if not eliminated, by the advances and expansions in electronic publication and other mass dissemination of unpublished decisions.

The unpublished decisions of most federal appellate courts, at least those rendered in the last ten years, are effectively "published" and accessible either via (1) electronic legal research services such as LEXIS and WESTLAW, (2) internet websites operated by the appellate courts themselves, or (3) a combination of both. Additionally, numerous specialized case reporters have sprung up in recent years, reporting on and reprinting published and unpublished cases alike on particular areas of law and practice. Given the widespread use of and general access to these electronic and specialty reporting media, concerns about litigants' inability to identify and collect relevant unpublished decisions should be minimized. Moreover, the extent to which unpublished decisions are made available through such media, as well as the accessibility of such media, are likely to increase and improve in the years ahead.[33]

Recently, the Committee on Federal Courts issued a report in which a majority of the members of the Committee recommended that the Second Circuit adopt a rule allowing

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[31] Shuldberg, supra note 9, at 561-62; Robel, supra note 32, at 960.

[32] Carpenter, supra note 25, at 258.

[33] Shuldberg, supra note 9, at 559-60.

citation to unpublished summary orders in cases where counsel believes that the summary orders have substantial persuasive value beyond any published decision.[34] The Committee found that the two rationales commonly advanced to prohibit citation to unpublished decisions – unfair access to unpublished opinions and judicial efficiency – were not persuasive to support a total ban on citation.[35] With respect to the first rationale, the Committee noted that the Second Circuit's unpublished summary orders are widely available on LEXIS, WESTLAW or the court's website, to which many lawyers now have access. Summary orders are no more difficult to find than many other types of authority which parties can cite, such as slip opinions, state court reporters, BNA reports, and the like.[36]

Further, there are strong countervailing "fairness" arguments that militate in favor of allowing citation to unpublished opinions. First, significant concerns about fairness are raised when a litigant is prohibited from calling to a court's attention a prior ruling of that court that may be relevant to the case at hand. Second, fairness issues also are presented when courts may have adopted guiding approaches and principles to particular legal issues that are embodied solely in unpublished opinions that, if not citable, are less likely to be known by litigants. Third, the "unequal access" concern voiced by advocates of no-citation rules for unpublished opinions is not eliminated by such rules, only disguised. Litigants better able to access unpublished opinions will be able to do so whether such opinions are citable or not. No-citation rules serve only to mask a litigant's reliance on the analysis or reasoning of such unpublished opinions, while still leaving the other party uninformed about the existence of the unpublished decision and other related unpublished opinions.

Quality of Decision-Making and Judicial Accountability

Another consideration is the effect of rules barring citation to unpublished decisions on quality of judicial decision-making and accountability. Even the best-intentioned court may be inclined to give less fulsome consideration to a case, at least at the opinion-writing stage, if the court knows that its decision can or will be designated as "not for publication" and therefore will not be citable.

Moreover, the quality of appellate decision-making may be adversely impacted by virtue of the fact that courts are depriving themselves of a universe of prior analysis, reasoning

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[34] Report of the Committee on Federal Courts on the Second Circuit's Rule Regarding Citation of Summary Orders (July 17, 1998) ("Committee on Federal Courts Report").

[35] *Id.* A minority of the Committee members dissented from the Committee's recommendation on the grounds of unequal access and concern that judges would abandon summary orders if they knew that parties could cite to them.

[36] *Id.*

and decision-making embodied in unpublished opinions. Regardless of the *precedential* effect of unpublished decisions, there appears to be no principled basis for refusing to consider unpublished opinions for their possible persuasive or instructive value.

Use of Public Forum for Private Dispute Resolution

As public institutions, appellate courts serve important public interests. One of those interests is to develop a body of law that resolves legal issues and guides future litigants, actual and potential. Rules that permit the issuance of "not for publication" decisions that cannot be used even for their persuasive value foster the notion of courts as private dispute resolution bodies, addressing cases for the sole benefit of the involved parties but not for the benefit of the public or legal community at large.

Moreover, the supposed efficiencies and cost savings of rules limiting the use and effect of unpublished opinions actually may have the opposite effect. By depriving litigants and courts of the use of such decisions as precedent or for persuasion, disputes or issues that may easily have been disposed of by reference to such decisions instead may linger or advance. In addition, the potential deterrent value of a prior adverse appellate decision is, for practical purposes, eliminated when the decision cannot be cited because it was not published.[37]

Finally, although concerns have been expressed about institutional litigants having better access to or familiarity with unpublished opinions favorable to their cause, there is a countervailing problem involving such litigants and unpublished opinions. Specifically, there is a risk that specifically, institutional litigants will be successful in "burying" adverse decisions by urging that they be designated as "not for publication." Simply stated, institutional litigants have a greater inherent incentive to manipulate the publication decision if that decision will render an unfavorable opinion uncitable by future adversaries.

4. Technology Considerations and Impacts on Citation to Unpublished Decisions

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[37] *See* Committee on Federal Courts Report, in which the Committee noted that:

> The pervasive use of summary orders has created a vast body of unpublished decisions which are often pertinent to issues arising before the Court, but which cannot be brought to the Court's attention under the current rule. . . . The inability under the current rule to bring a highly pertinent summary order to the attention of the Court leads to unnecessary briefing and argument by the parties and wastes judicial time and effort. It is also odd to have a body of decisional law that cannot be cited yet may be recalled by judges who participated in creating it or may be found by law clerks doing research. Perhaps most significantly, the current rule risks the possibility that two identical cases could be decided inconsistently, in violation of the Courts' most basic obligation to treat like cases the same.

Due to advances in technology from the time the rules restricting citation were formulated, it is no longer as difficult to track down and utilize unpublished case law. Now, the unpublished opinions of most of the federal circuits are available electronically in one form or another. Most of the circuits have submitted the full text of their unpublished opinions to either LEXIS or WESTLAW since the late 1980's or early 1990's.[38] In addition, the First, Second, Eighth and Tenth Circuits put their unpublished opinions and orders on-line on the courts' websites. Further, many specialized reporters gather unpublished opinions that are of interest to their particular area of law, and these reporters often are available on-line or can be purchased on CD-ROMs.

With the increasing use of electronic means of collecting, storing and researching legal opinions, the fears of prohibitive costs and unequal access should be minimized. Computers and CD-ROMs take up much less space than printed case reporters, with considerable savings in the cost of storage space and purchasing expensive books.[39] Although computer research is not without pitfalls, overall it allows a researcher to work more quickly and efficiently, particularly as new generations of attorneys now are wholly computer-literate.[40]

However, as noted above, not all federal circuits make their unpublished opinions available in electronic form. This inconsistency could result in significant gaps in legal research and cause researchers to overlook opinions that directly impact their issue. Because the use of decisions in electronic format is so widespread, it is recommended that all the federal circuits take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet websites.

Ronald Jay Cohen, Chair, Section of Litigation

August 2001

[38] Exceptions are the Third Circuit, the Fifth Circuit and the Eleventh Circuit, which do not make their unpublished opinions available electronically.

[39] Shuldberg, supra note 9, at 558.

[40] Id. at 559.

DRAFT – March 30, 2001

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to Instructions for completing this form.)

Submitting Entity: Section of Litigation

Submitted By: Ronald J. Cohen, Chair, Section of Litigation

1. Summary of Recommendation(s).

The Section of Litigation and its co-sponsors, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division, recommend that the Association adopt policy urging federal courts of appeals to make their unpublished decisions more widely available through various print or electronic means, and to permit citation to relevant unpublished opinions.

2. Approval by Submitting Entity.

The report with recommendation on unpublished opinions was unanimously approved by the Council of the Section of Litigation on January 4, 2001.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The "Standards Relating to Appellate Courts," approved by the House of Delegates in February 1977 and amended by the House of Delegates in August 1994 state:

> Opinions of an appellate court should be a matter of public record . . . .

"Publication of Opinions," § 3.37(a). This policy would be reinforced by the recommendation with specific reference to unpublished opinions.

The "Standards Relating to Appellate Courts" also state:

> Rules of court should provide that an opinion which is not formally published may not be cited, but may be used to establish *res judicata*[,] collateral estoppel, law of the case, or other similar purposes.

"Citation of Opinions Not Formally Published," § 3.37(c). The accompanying commentary further states that:

> Allowing citation of unpublished opinions creates pressures to make such opinions generally available, resulting in a secondary system of unofficial publication which to some extent frustrates the purpose of the nonpublication rule.

Thus, adoption of the Recommendation will require reconsideration of this existing policy.

5. What urgency exists with requires action at this meeting of the House?

Access to, and fair use of, unpublished opinions is an important matter in the overall administration of justice in the federal courts, and thus requires prompt attention.

6. Status of Legislation. (If applicable.)

Not applicable.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

On April 6, 2001 the Report and Recommendation to the House of Delegates on the Use and Effect of Unpublished Opinions in the Federal Courts of Appeals was circulated for public comment to the State Delegates, House of Delegates; all ABA Standing Committees; and all ABA Sections and other entities.

In May 2001, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division agreed to co-sponsor the Report and Recommendation on the Use and Effect of Unpublished Opinions.

10. Contact Person. (Prior to the meeting.)

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DRAFT – March 30, 2001

EXECUTIVE SUMMARY OF THE REPORT AND RECOMMENDATION

A. Summary of the Recommendation

The Section of Litigation and its co-sponsors, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division, recommend that the Association should support a recommendation that all federal appellate courts should (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and (2) permit citation to relevant unpublished opinions.

B. Summary of the Issue

As the number of cases heard and decided by federal appellate courts increased, without a concomitant increase in staffing, funding, or judicial resources, the courts adopted rules concerning the publication and non-publication of their decisions, and set parameters concerning the use and effect of citation to unpublished decisions. A slim majority of federal appellate courts has adopted the rule that decisions not designated for publication not only do not constitute binding precedent, but cannot even be cited for their possible persuasive value. The issue is whether the traditional justifications for this rule are still valid or whether sound litigation reasons exist for allowing citation to unpublished opinions.

The Report makes the above recommendations because the traditional justifications for the current rules prohibiting citation to unpublished federal appellate court opinions – the increased cost and time to obtain, store and research a growing body of case law, the need for judicial efficiency, and the perceived unfairness to some litigants over access to unpublished opinions – no longer carry substantial weight. Several practical litigation considerations exist to support a departure from the current rules.

> First, and perhaps foremost, is the issue of the quality and extent of the record upon which to base a further appeal. Rules barring citation to unpublished decisions prevent a party from creating a complete record of the authorities and prior appellate rulings bearing on a matter.
>
> Second, by restricting the effect and use of such decisions, rules against citation of unpublished decisions also impact the appellate court's ability to provide a complete and instructive record of the court's analysis and rationale for its decision, likewise impacting future proceedings. This impact can be felt both in terms of a court's inability to support its decision by reference to prior (but unpublished) decisions, and in its inability to cite or rely upon such decisions in distinguishing the outcome of another case.
>
> Third, rules against citing unpublished decisions may create anomalous situations in which the prior (but unpublished) decisions of a particular court of appeals are given less weight (or perhaps no weight at all) than (published) decisions of other appellate courts. Both litigants and appellate courts likely would agree that the expectations of the parties and the federal appellate system would be better served where a court's own body of prior decision-making is given proper credence and effect vis-a-vis the decisions of a sister court.
>
> Fourth, the lack of uniformity among the rules and approaches of the various federal appeals courts also is problematic. The same unpublished opinion may be citable for its persuasive value in one circuit court, but not citable in another. This difference in approach is particularly vexing because it could result in situations where an unpublished opinion could be cited to sister courts, but not to the court authoring the opinion.

The fairness and access concerns that historically have been raised to justify rules against citation to unpublished decisions have been diminished by the advances and expansions

in electronic publication and other mass dissemination of unpublished decisions. The unpublished opinions of most of the federal circuits are available electronically, either on LEXIS, WESTLAW, CD-ROM, court websites, or in specialized reporters. Overall, access to these unofficial reporting media has increased, while the cost of collecting, storing and researching has decreased.

C. Impact of the Policy Recommendation

Allowing citation to unpublished opinions will help to ensure that judges will give full consideration to their decisions in all cases, by encouraging more complete analysis in unpublished opinions as well as allowing parties to make the courts aware of the complete body of case law that may affect their particular case. In contrast, depriving litigants and courts of the use of such decisions as precedent or for persuasion may cause disputes or issues that may easily have been disposed of by reference to such decisions instead to linger or advance. In addition, the potential deterrent value of a prior adverse appellate decision is, for practical purposes, eliminated when the decision cannot be cited because it was not published. Finally, citation to unpublished opinions will deter institutional litigants from attempting to influence the publication decision to eliminate the effect of unfavorable opinions against them. Thus, citation to unpublished opinions will benefit judges and litigants alike.

D. Opposing Views

There are two traditional justifications for preventing citation to unpublished opinions. First, it is argued that unfettered citation to unpublished opinions would substantially undermine the purposes of selective publication – reduction of costs and increased judicial efficiency. Second, there is a concern that allowing citation to unpublished decisions is unfair because certain litigants would have more access to the body of unpublished opinions than others. The Report discusses these justifications and concludes that they are no longer valid in the modern legal profession.

AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION
CRIMINAL JUSTICE SECTION
TORT AND INSURANCE PRACTICE SECTION
SENIOR LAWYERS DIVISION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED THAT the American Bar Association opposes the practice of various federal courts of appeal in prohibiting citation to or reliance upon their unpublished opinions as contrary to the best interests of the public and the legal profession.

FURTHER RESOLVED THAT the American Bar Association urges the federal courts of appeals uniformly to:

1) Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and

2) Permit citation to relevant unpublished opinions.

DRAFT – March 30, 2001

REPORT ON RECOMMENDATION FOR PUBLICATION AND RELIANCE UPON UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS

As the number of cases heard and decided by federal appellate courts increased, without a concomitant increase in staffing, funding, or judicial resources, the courts adopted rules concerning the publication and non-publication of their decisions, and set parameters concerning the use and effect of and citation to unpublished decisions. Generally speaking, the approach favored by the federal courts of appeals has been to give the courts discretion in deciding which cases to publish in official case reporters, and which cases not to publish. The appellate courts also have discretion to determine whether, to what extent, and for what purposes their unpublished decisions may be cited. A slim majority of federal appellate courts has adopted a companion principle, which is that decisions not designated for publication not only do not constitute binding precedent, but cannot even be cited for their possible persuasive value.

This Report provides an overview and summary of federal courts of appeals rules concerning litigants' ability (or inability) to cite unpublished opinions and the effect, if any, to be given by the courts to such unpublished decisions. The Report examines the historic rationale for such rules and addresses the continued vitality of these rationale. The Report concludes that the justifications for rules prohibiting citation to unpublished federal appellate decisions no longer carry substantial weight, and that the ABA should support a recommendation that all federal appellate courts (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet websites; and (2) permit citation to relevant unpublished opinions.[1]

1. Overview of Federal Appellate Court Rules Concerning Citations to Unpublished Decisions or Orders

All of the federal courts of appeals have rules governing citation to unpublished decisions or orders. These rules fall into two general categories.

The first category consists of rules that prohibit the citation to unpublished decisions except for purposes of establishing the doctrines of the law of the case, *res judicata* or collateral estoppel. The Federal, District of Columbia, First, Second, Seventh, Eighth and Ninth Circuits, as well as the Federal Court of Claims, have such rules.[2]

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[1] The Report and Recommendation do not address the threshold issue of publication of appellate decisions or the criteria employed by courts in making decisions concerning publication.

[2] *See* Fed. Cir. R. 47.6(b); D.C. Cir. R. 28(c); 1st Cir. R. 36(2)(F); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 8th Cir. R. 28A(i); 9th Cir. R. 36-3; Fed. Ct. Cl. R. 52.1. *But see* discussion *infra* at 3.A. concerning the Eighth Circuit's recent decision concerning the constitutionality of its rule.

The Court of Appeals for the District of Columbia goes further in prohibiting citation not only to the court's own unpublished decisions, but to unpublished decisions from other courts as well, unless the particular court considers its unpublished decisions to be precedential.[3]

The second category consists of rules that disfavor the citation to unpublished decisions, but allow citation if counsel believes that the decision has precedential value in relation to a material issue in a case and if there is no published opinion that would serve as well. The rules require that counsel must provide a copy of the unpublished opinion to the court. The Fourth, Fifth, Sixth, Tenth and Eleventh Circuits take this approach.[4]

Finally, the Third Circuit simply states that it will itself not cite to any of its unpublished opinions because they are not precedent.[5] However, the Third Circuit does not place any restrictions on the ability of parties to cite to unpublished decisions.[6]

In addition to the federal court rules, the American Bar Association's Standing Committee on Ethics states that it is:

> ethically improper for a lawyer to cite to a court an unpublished opinion . . . where the forum court has a specific rule prohibiting any reference in briefs to an opinion . . . marked . . . 'not for publication.'[7]

2. Origins of and Rationale for Rules Restricting Effect of and Citation to Unpublished Decisions or Orders

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[3] *See* D.C. Cir. R. 28(c).

[4] *See* 4th Cir. R. 36(c); 5th Cir. R. 47.5; 6th Cir. R. 24(c); 10th Cir. R. 36.3; 11th Cir. R. 36-2; *see also* Report of the Committee on Federal Courts on the Second Circuit's Rule Regarding Citation of Summary Orders (July 17, 1998), discussed *infra* at 3.C, in which the Committee on Federal Courts recommends that the Second Circuit adopt a rule governing citation to unpublished summary orders similar to the rules in the Fourth, Sixth and Tenth Circuits.

[5] 3d Cir. IOP 5.8.

[6] *See* 3d Cir. R. 28.3 ("Citations to federal decisions that have not been formally reported shall identify the court, docket number and date, and refer to the electronically transmitted decision.").

[7] ABA Formal Op. 94-386R.

The origin of rules restricting citation to unpublished decisions is linked to the determination that certain opinions should not be published.[8] Up to and through the 1960's and 1970's, the vast majority of decisions from federal courts, even one-word Memorandum Decisions, routinely were published.[9] However, that same period experienced a significant increase in the number of opinions being handed down by the federal courts.[10] In 1964 the Judicial Conference of the United States expressed concern over the number of published opinions that might impose unreasonable costs and practical difficulties in maintaining access to the published reports.[11] Thus, the Judicial Conference recommended that the federal courts of appeals publish "only those opinions which are of general precedential value."[12] In 1971 the Federal Judicial Center issued a report which further highlighted the problems faced by the federal courts due to the increasing caseload.[13] In 1972, the Judicial Conference directed the federal circuits to develop plans to limit the publication of opinions, which eventually resulted in the current rules in the federal courts.[14]

The concern over the number of opinions generally is expressed in two ways. First, as the amount of decisions increases, so too does the cost of publishing, disseminating and researching them.[15] There was a fear that the increased costs will be passed on to the consumer of legal services, resulting in inequities as only those who can afford to pay these high costs will obtain the best legal advice.[16]

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[8] For an in-depth discussion of the history and rationale for unpublished opinions, see Donna Stienstra, Federal Judicial Center, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (1985); William L. Reynolds and William M. Richman, The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978) ("Reynolds and Richman I"); William L. Reynolds and William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U.Chi. L. Rev. 573 (1981) ("Reynolds and Richman II").

[9] Kirt Shuldberg, Digital Influence: Technology and Unpublished Opinions in the federal courts of appeals, 85 Calif. L. Rev. 541, 546 (1997); Donald R. Songer, Criteria for Publication in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 308 (1990) ("It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small.").

[10] Hon. Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 Ohio St. L.J. 177, 181-85 (1999).

[11] Report of the Proceedings of the Judicial Conference of the United States 11 (1964).

[12] *Id.*

[13] William L. Reynolds and William M. Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L.J. 806, 808 (1979).

[14] Report of the Proceedings of the Judicial Conference of the United States 33 (1972).

[15] Shuldberg, supra note 9, at 547-48.

[16] Reynolds and Richman I, supra note 8, at 1188-89.

As the number of federal cases grew, federal judges and their clerks indicated that they were unable to keep up with and resolve their caseloads in a timely manner. Thus, a second concern was that the efficiency of the federal court system would be compromised by the need to publish every single decision, no matter how unimportant.[17] By selectively publishing opinions, judges could spend less time writing opinions and more time resolving a larger number of cases.[18] Moreover, in the interests of judicial efficiency, courts should spend more time on published opinions that substantially advance the state of the law, and not publish opinions that only resolve a dispute between litigants.[19]

Having made the determination not to publish certain decisions, it quickly was decided that citation to these decisions should be restricted. It was argued that unfettered citation to unpublished decisions would substantially undermine the purposes of selective publication – reduction of costs and increased judicial efficiency.[20] If litigants could cite to unpublished decisions, the parties and the court still would have to spend time researching these cases.[21] Alternate collections of these decisions would develop and practitioners and law libraries would have to invest funds to keep abreast of these collections. Judicial efficiency also would suffer, the argument went, because judges would feel compelled to spend more time writing opinions that they know were going to be cited anyway.[22]

In addition, there was a concern that allowing citation to unpublished decisions was unfair because certain litigants would have more access to the body of unpublished opinions than others.[23] For example, attorneys with greater time and resources would more easily be able to bear the costs of researching and maintaining collections of the decisions, and frequent litigants, such as the government, would have access to a greater number of unpublished opinions

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[17] Shuldberg, supra note 9, at 548; Martin, supra note 10, at 190; Joiner, Limiting Publication of Judicial Opinions, 56 Judicature 195, 196 (1972).

[18] Martin, supra note 10, at 190; George M. Weaver, The Precedential Value of Unpublished Judicial Opinions, 39 Mercer L. Rev. 477, 479 (1986).

[19] Richard A. Posner, The Federal Courts: Crisis and Reform, 124 (1985); Comm. on the Use of Appellate Court Energies, Advisory Council for Appellate Justice, FJC Research Series No. 73-2, Standards for Publication of Judicial Opinions 5 (1973).

[20] Reynolds and Richman I, supra note 8, at 1186-87.

[21] Shuldberg, supra note 9, at 550; Martin, supra note 10, at 190.

[22] Shuldberg, supra note 9, at 550.

[23] *Id.*

issued in the numerous cases in which they are involved.[24] The argument was that citation to unpublished decisions should be restricted so that these attorneys and litigants did not have an unfair advantage over smaller or less well-funded parties.

3. Bases for Recommending Changes to Rules Restricting Effect of and Citation to Unpublished Decisions

Many of the stated justifications for rules limiting or prohibiting citation of unpublished decisions deserve renewed scrutiny today, especially in view of technological developments that have made the availability and accessability of unpublished decisions more widespread and easier than in the past.[25] In addition, a recent decision of the Eight Circuit Court of Appeals addressing the issue of the Constitutionality of rules barring citation to unpublished decisions bears mention, although the focus of this Report and the bases for the proposed Recommendation involve practical concerns and general issues of the operation of appellate courts and their decision-making rather than the Constitutional grounds raised by the Eighth Circuit.

Constitutional Analysis of *Anastasoff v. U.S.*

A panel of the Eighth Circuit Court of Appeals recently added a new wrinkle to the debate over unpublished opinions in the case *Anastasoff v. United States*.[26] On August 22, 2000, Judge Richard S. Arnold, writing for the court, held that the Eighth Circuit's rule restricting citation to unpublished opinions violated Article III of the Constitution. In affirming the district court's denial of Ms. Anastasoff's claim for a tax refund, the panel relied on an unpublished Eighth Circuit case, *Christie v. United States*. *Christie* was directly on point and squarely addressed the issue before the court.

Ms. Anastasoff argued that the panel was not bound by the decision in *Christie* because, per the Eighth Circuit's own rule, it was unpublished.[27] Rather than follow the rule, Judge Arnold noted that the Framers of the Constitution considered the federal courts to have

[24] Standards for Publication, supra note 19, at 18; Stienstra, supra note 8, at 3 (noting that the U.S. Attorney is a frequent litigant who might benefit if citation to unpublished opinions is allowed); Reynolds and Richman I, supra note 8, at 1179; Lauren K. Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals, 87 Mich. L. Rev. 940, 958-59 (1989).

[25] *See, e.g.*, Charles E. Carpenter, Jr., The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy? 50 S.C. L. Rev. 235 (1998); Shuldberg, supra note 12.

[26] 223 F.3d 989 (8th Cir. 2000).

[27] *See* 8th Cir. R. 28A(i).

certain powers, which the Framers delegated to the courts and limited by virtue of Article III. Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. Therefore, the Framers considered that every judicial decision is authoritative to the extent necessary for the decision and must be applied in subsequent cases to similarly situated parties. Because all judicial decisions result in the creation of precedent, and Article III implicitly formalizes the doctrine of precedent, the federal courts do not have the power to decide which of their opinions create precedent. Thus, the rules purporting to restrict the creation of precedent are unconstitutional.

Judge Arnold was careful to point out that the panel's decision in *Anastasoff* does not impact the federal courts' ability to designate certain opinions as not for publication. Judge Arnold's point was that, regardless of the fact that nonpublication of decisions may have practical value in terms of saving space and time, the federal courts do not have the discretion to limit the doctrine of precedent implicit in Article III.

Ms. Anastasoff filed a petition for rehearing *en banc* before the Eighth Circuit.[28] Before the *en banc* panel could issue a decision, the United States mooted the case by paying Anastasoff the entire amount of her claimed refund. Consequently, on December 18, 2000, the *en banc* panel vacated Judge Arnold's opinion and remanded to the District Court with directions to vacate its judgment as moot.[29]

Practical Litigation Concerns

Several practical litigation considerations can be advanced to support a departure from rules limiting or forbidding citation to unpublished decisions.

First, and perhaps foremost, is the issue of the quality and extent of the record upon which to base a further appeal. Rules barring citation to unpublished decisions prevent a party from creating a complete record of the authorities and prior appellate rulings bearing on a matter.[30]

Second, by restricting the effect and use of such decisions, rules against citation of unpublished decisions also impact the appellate court's ability to provide a complete and instructive record of the court's analysis and rationale for its decision, likewise impacting future proceedings. This impact can be felt both in terms of a court's inability to support its decision by

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[28] *See* Steve France, Analysis & Perspective, 69 U.S. Law Week 2227 (BNA, Oct. 24, 2000).

[29] United States v. Anastasoff, 235 F.3d 1054 (8th Cir. 2000).

[30] Carpenter, supra note 25, at 247-48.

reference to prior (but unpublished) decisions, and in its inability to cite or rely upon such decisions in distinguishing the outcome of another case.[31]

Third, rules against citing unpublished decisions may create anomalous situations in which the prior (but unpublished) decisions of a particular court of appeals are given less weight (or perhaps no weight at all) than (published) decisions of other appellate courts. Both litigants and appellate courts likely would agree that the expectations of the parties and the federal appellate system would be better served where a court's own body of prior decision-making is given proper credence and effect vis-a-vis the decisions of a sister court.[32]

Fourth, the lack of uniformity among the rules and approaches of the various federal appeals courts also is problematic. The same unpublished opinion may be citable for its persuasive value in one circuit court, but not citable in another. This difference in approach is particularly vexing because it could result in situations where an unpublished opinion could be cited to sister courts, but not to the court authoring the opinion.

Fairness/Access Issues

The fairness and access concerns that historically have been raised to justify rules against citation to unpublished decisions appear to be obviated, if not eliminated, by the advances and expansions in electronic publication and other mass dissemination of unpublished decisions.

The unpublished decisions of most federal appellate courts, at least those rendered in the last ten years, are effectively "published" and accessible either via (1) electronic legal research services such as LEXIS and WESTLAW, (2) internet websites operated by the appellate courts themselves, or (3) a combination of both. Additionally, numerous specialized case reporters have sprung up in recent years, reporting on and reprinting published and unpublished cases alike on particular areas of law and practice. Given the widespread use of and general access to these electronic and specialty reporting media, concerns about litigants' inability to identify and collect relevant unpublished decisions should be minimized. Moreover, the extent to which unpublished decisions are made available through such media, as well as the accessibility of such media, are likely to increase and improve in the years ahead.[33]

Recently, the Committee on Federal Courts issued a report in which a majority of the members of the Committee recommended that the Second Circuit adopt a rule allowing

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[31] Shuldberg, supra note 9, at 561-62; Robel, supra note 32, at 960.

[32] Carpenter, supra note 25, at 258.

[33] Shuldberg, supra note 9, at 559-60.

citation to unpublished summary orders in cases where counsel believes that the summary orders have substantial persuasive value beyond any published decision.[34] The Committee found that the two rationales commonly advanced to prohibit citation to unpublished decisions – unfair access to unpublished opinions and judicial efficiency – were not persuasive to support a total ban on citation.[35] With respect to the first rationale, the Committee noted that the Second Circuit's unpublished summary orders are widely available on LEXIS, WESTLAW or the court's website, to which many lawyers now have access. Summary orders are no more difficult to find than many other types of authority which parties can cite, such as slip opinions, state court reporters, BNA reports, and the like.[36]

Further, there are strong countervailing "fairness" arguments that militate in favor of allowing citation to unpublished opinions. First, significant concerns about fairness are raised when a litigant is prohibited from calling to a court's attention a prior ruling of that court that may be relevant to the case at hand. Second, fairness issues also are presented when courts may have adopted guiding approaches and principles to particular legal issues that are embodied solely in unpublished opinions that, if not citable, are less likely to be known by litigants. Third, the "unequal access" concern voiced by advocates of no-citation rules for unpublished opinions is not eliminated by such rules, only disguised. Litigants better able to access unpublished opinions will be able to do so whether such opinions are citable or not. No-citation rules serve only to mask a litigant's reliance on the analysis or reasoning of such unpublished opinions, while still leaving the other party uninformed about the existence of the unpublished decision and other related unpublished opinions.

Quality of Decision-Making and Judicial Accountability

Another consideration is the effect of rules barring citation to unpublished decisions on quality of judicial decision-making and accountability. Even the best-intentioned court may be inclined to give less fulsome consideration to a case, at least at the opinion-writing stage, if the court knows that its decision can or will be designated as "not for publication" and therefore will not be citable.

Moreover, the quality of appellate decision-making may be adversely impacted by virtue of the fact that courts are depriving themselves of a universe of prior analysis, reasoning

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[34] Report of the Committee on Federal Courts on the Second Circuit's Rule Regarding Citation of Summary Orders (July 17, 1998) ("Committee on Federal Courts Report").

[35] *Id.* A minority of the Committee members dissented from the Committee's recommendation on the grounds of unequal access and concern that judges would abandon summary orders if they knew that parties could cite to them.

[36] *Id.*

and decision-making embodied in unpublished opinions. Regardless of the *precedential* effect of unpublished decisions, there appears to be no principled basis for refusing to consider unpublished opinions for their possible persuasive or instructive value.

Use of Public Forum for Private Dispute Resolution

As public institutions, appellate courts serve important public interests. One of those interests is to develop a body of law that resolves legal issues and guides future litigants, actual and potential. Rules that permit the issuance of "not for publication" decisions that cannot be used even for their persuasive value foster the notion of courts as private dispute resolution bodies, addressing cases for the sole benefit of the involved parties but not for the benefit of the public or legal community at large.

Moreover, the supposed efficiencies and cost savings of rules limiting the use and effect of unpublished opinions actually may have the opposite effect. By depriving litigants and courts of the use of such decisions as precedent or for persuasion, disputes or issues that may easily have been disposed of by reference to such decisions instead may linger or advance. In addition, the potential deterrent value of a prior adverse appellate decision is, for practical purposes, eliminated when the decision cannot be cited because it was not published.[37]

Finally, although concerns have been expressed about institutional litigants having better access to or familiarity with unpublished opinions favorable to their cause, there is a countervailing problem involving such litigants and unpublished opinions. Specifically, there is a risk that specifically, institutional litigants will be successful in "burying" adverse decisions by urging that they be designated as "not for publication." Simply stated, institutional litigants have a greater inherent incentive to manipulate the publication decision if that decision will render an unfavorable opinion uncitable by future adversaries.

4. Technology Considerations and Impacts on Citation to Unpublished Decisions

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[37] *See* Committee on Federal Courts Report, in which the Committee noted that:

> The pervasive use of summary orders has created a vast body of unpublished decisions which are often pertinent to issues arising before the Court, but which cannot be brought to the Court's attention under the current rule. . . . The inability under the current rule to bring a highly pertinent summary order to the attention of the Court leads to unnecessary briefing and argument by the parties and wastes judicial time and effort. It is also odd to have a body of decisional law that cannot be cited yet may be recalled by judges who participated in creating it or may be found by law clerks doing research. Perhaps most significantly, the current rule risks the possibility that two identical cases could be decided inconsistently, in violation of the Courts' most basic obligation to treat like cases the same.

Due to advances in technology from the time the rules restricting citation were formulated, it is no longer as difficult to track down and utilize unpublished case law. Now, the unpublished opinions of most of the federal circuits are available electronically in one form or another. Most of the circuits have submitted the full text of their unpublished opinions to either LEXIS or WESTLAW since the late 1980's or early 1990's.[39] In addition, the First, Second, Eighth and Tenth Circuits put their unpublished opinions and orders on-line on the courts' websites. Further, many specialized reporters gather unpublished opinions that are of interest to their particular area of law, and these reporters often are available on-line or can be purchased on CD-ROMs.

With the increasing use of electronic means of collecting, storing and researching legal opinions, the fears of prohibitive costs and unequal access should be minimized. Computers and CD-ROMs take up much less space than printed case reporters, with considerable savings in the cost of storage space and purchasing expensive books.[39] Although computer research is not without pitfalls, overall it allows a researcher to work more quickly and efficiently, particularly as new generations of attorneys now are wholly computer-literate.[40]

However, as noted above, not all federal circuits make their unpublished opinions available in electronic form. This inconsistency could result in significant gaps in legal research and cause researchers to overlook opinions that directly impact their issue. Because the use of decisions in electronic format is so widespread, it is recommended that all the federal circuits take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet websites.

Ronald Jay Cohen, Chair, Section of Litigation

August 2001

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[39] Exceptions are the Third Circuit, the Fifth Circuit and the Eleventh Circuit, which do not make their unpublished opinions available electronically.

[39] Shuldberg, supra note 9, at 558.

[40] Id. at 559.

DRAFT – March 30, 2001

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to Instructions for completing this form.)

Submitting Entity: Section of Litigation

Submitted By: Ronald J. Cohen, Chair, Section of Litigation

1. Summary of Recommendation(s).

The Section of Litigation and its co-sponsors, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division, recommend that the Association adopt policy urging federal courts of appeals to make their unpublished decisions more widely available through various print or electronic means, and to permit citation to relevant unpublished opinions.

2. Approval by Submitting Entity.

The report with recommendation on unpublished opinions was unanimously approved by the Council of the Section of Litigation on January 4, 2001.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The "Standards Relating to Appellate Courts," approved by the House of Delegates in February 1977 and amended by the House of Delegates in August 1994 state:

> Opinions of an appellate court should be a matter of public record . . . .

"Publication of Opinions," § 3.37(a). This policy would be reinforced by the recommendation with specific reference to unpublished opinions.

The "Standards Relating to Appellate Courts" also state:

> Rules of court should provide that an opinion which is not formally published may not be cited, but may be used to establish *res judicata*[,] collateral estoppel, law of the case, or other similar purposes.

"Citation of Opinions Not Formally Published," § 3.37(c). The accompanying commentary further states that:

> Allowing citation of unpublished opinions creates pressures to make such opinions generally available, resulting in a secondary system of unofficial publication which to some extent frustrates the purpose of the nonpublication rule.

Thus, adoption of the Recommendation will require reconsideration of this existing policy.

5. What urgency exists with requires action at this meeting of the House?

Access to, and fair use of, unpublished opinions is an important matter in the overall administration of justice in the federal courts, and thus requires prompt attention.

6. Status of Legislation. (If applicable.)

Not applicable.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

On April 6, 2001 the Report and Recommendation to the House of Delegates on the Use and Effect of Unpublished Opinions in the Federal Courts of Appeals was circulated for public comment to the State Delegates, House of Delegates; all ABA Standing Committees; and all ABA Sections and other entities.

In May 2001, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division agreed to co-sponsor the Report and Recommendation on the Use and Effect of Unpublished Opinions.

10. Contact Person. (Prior to the meeting.)

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EXECUTIVE SUMMARY OF THE REPORT AND RECOMMENDATION

A. Summary of the Recommendation

The Section of Litigation and its co-sponsors, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division, recommend that the Association should support a recommendation that all federal appellate courts should (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and (2) permit citation to relevant unpublished opinions.

B. Summary of the Issue

As the number of cases heard and decided by federal appellate courts increased, without a concomitant increase in staffing, funding, or judicial resources, the courts adopted rules concerning the publication and non-publication of their decisions, and set parameters concerning the use and effect of citation to unpublished decisions. A slim majority of federal appellate courts has adopted the rule that decisions not designated for publication not only do not constitute binding precedent, but cannot even be cited for their possible persuasive value. The issue is whether the traditional justifications for this rule are still valid or whether sound litigation reasons exist for allowing citation to unpublished opinions.

The Report makes the above recommendations because the traditional justifications for the current rules prohibiting citation to unpublished federal appellate court opinions – the increased cost and time to obtain, store and research a growing body of case law, the need for judicial efficiency, and the perceived unfairness to some litigants over access to unpublished opinions – no longer carry substantial weight. Several practical litigation considerations exist to support a departure from the current rules.

> First, and perhaps foremost, is the issue of the quality and extent of the record upon which to base a further appeal. Rules barring citation to unpublished decisions prevent a party from creating a complete record of the authorities and prior appellate rulings bearing on a matter.
>
> Second, by restricting the effect and use of such decisions, rules against citation of unpublished decisions also impact the appellate court's ability to provide a complete and instructive record of the court's analysis and rationale for its decision, likewise impacting future proceedings. This impact can be felt both in terms of a court's inability to support its decision by reference to prior (but unpublished) decisions, and in its inability to cite or rely upon such decisions in distinguishing the outcome of another case.
>
> Third, rules against citing unpublished decisions may create anomalous situations in which the prior (but unpublished) decisions of a particular court of appeals are given less weight (or perhaps no weight at all) than (published) decisions of other appellate courts. Both litigants and appellate courts likely would agree that the expectations of the parties and the federal appellate system would be better served where a court's own body of prior decision-making is given proper credence and effect vis-a-vis the decisions of a sister court.
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> Fourth, the lack of uniformity among the rules and approaches of the various federal appeals courts also is problematic. The same unpublished opinion may be citable for its persuasive value in one circuit court, but not citable in another. This difference in approach is particularly vexing because it could result in situations where an unpublished opinion could be cited to sister courts, but not to the court authoring the opinion.

The fairness and access concerns that historically have been raised to justify rules against citation to unpublished decisions have been diminished by the advances and expansions

in electronic publication and other mass dissemination of unpublished decisions. The unpublished opinions of most of the federal circuits are available electronically, either on LEXIS, WESTLAW, CD-ROM, court websites, or in specialized reporters. Overall, access to these unofficial reporting media has increased, while the cost of collecting, storing and researching has decreased.

C. Impact of the Policy Recommendation

Allowing citation to unpublished opinions will help to ensure that judges will give full consideration to their decisions in all cases, by encouraging more complete analysis in unpublished opinions as well as allowing parties to make the courts aware of the complete body of case law that may affect their particular case. In contrast, depriving litigants and courts of the use of such decisions as precedent or for persuasion may cause disputes or issues that may easily have been disposed of by reference to such decisions instead to linger or advance. In addition, the potential deterrent value of a prior adverse appellate decision is, for practical purposes, eliminated when the decision cannot be cited because it was not published. Finally, citation to unpublished opinions will deter institutional litigants from attempting to influence the publication decision to eliminate the effect of unfavorable opinions against them. Thus, citation to unpublished opinions will benefit judges and litigants alike.

D. Opposing Views

There are two traditional justifications for preventing citation to unpublished opinions. First, it is argued that unfettered citation to unpublished opinions would substantially undermine the purposes of selective publication – reduction of costs and increased judicial efficiency. Second, there is a concern that allowing citation to unpublished decisions is unfair because certain litigants would have more access to the body of unpublished opinions than others. The Report discusses these justifications and concludes that they are no longer valid in the modern legal profession.